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Supreme Court of the United States.

OCTOBER TERM, 1899

O. G. BLAKE AND ROGERS, BROWN & COMPANY, Plaintiffs in Error,

vs.

CALVIN M. McCLUNG, WILLIAM P. SMITH, WILLIAM B. KEENER, FRANKLIN H. McCLUNG, Jr., AND CHARLES J. McCLUNG, Jr., PARTNERS AS C. M. McCLUNG & COMPANY, et al.

No. 466.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Brief for Plaintiffs in Error.

TULLY R. CORNICK,
HEBER J. MAY,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT.

This cause has been before this Court before upon a writ of error. The final judgment of the Supreme Court of Tennessee was then reversed as to the present plaintiffs in error, and the cause remanded for further proceedings *not inconsistent* with the opinion then delivered. The mandate, which will be found on pages 1 to 4 of the record, went down in course, and a motion was

made by the solicitor of Blake, and Rogers, Brown & Company for the entry of a decree in their favor in accordance with the mandate and opinion in *Blake* v. *McClung* (172 U. S., 239). The Supreme Court of Tennessee proceeded with the consideration of the motion, and finally entered a decree, which will be found on pages 7 and 8 of the record. Mr. Justice Beard dissented to this decree, for reasons given in the opinion of the court. (Record, 6, 7.)

The opinion of the Supreme Court of Tennessee has been printed. (Record, 4, 7.)

To the action of the Supreme Court of Tennessee in entering its decree upon the mandate of this Court, the plaintiffs in error only excepted. (Record, 8.) A writ of error was allowed by the Chief Justice of the Supreme Court of Tennessee. (Record, 11.) Service of citation was acknowledged. (Record, 14.) The assignment of errors will be found on pages 9 and 10 of the record.

BRIEF.

We contend that the Supreme Court of Tennessee has mistaken or misconstrued the mandate of this Court in *Blake* v. *McClung* (172 U. S., 239), which reversed the decree of the former Court as to C. G. Blake, and Rogers, Brown & Company, and has entered a decree inconsistent with said mandate and the opinion of this Court.

The question then before this Court, as presented for adjudication by the writ of error of Blake, and Rogers, Brown & Company, was as to the status of the said

plaintiffs in error under what was claimed to be an unconstitutional statute of Tennessee. Blake, and Rogers, Brown & Company contended from the first, and the sole object of their writ of error was to sustain such contention, that they were entitled to the same status and privilege in the distribution of the assets of the Embreeville Company that had been adjudged to the resident creditors of Tennessee, and this Court sustained their contention.

The assignments of error and the argument of counsel proceeded upon this basis. Of course it was necessary in order to reach the primary object contended for by Blake, and Rogers, Brown & Company, namely, to give them the same privilege in the distribution of the assets of the Embreeville Company as the Tennessee creditors, to destroy, by judicial determination, the effect of the void statute of the State of Tennessee. This was done in this Court by them upon their writ of error, and the benefit of the reversal of the decree upon said writ of error resulted to them only, inasmuch as the decree as to the Hull Coal and Coke Company, their co-plaintiff in error, was affirmed.

Our contention is that the decree of the Supreme Court of Tennessee has been reversed as to Blake, and Rogers, Brown & Company by this court, and that the effect of the reversal is to place the said parties in the category of the Tennessee creditors in the matter of distribution, and that all the other parties to the suit and decree below are left undisturbed as to such distribution, and in every respect, and that the decree of the court below is in force

as to them in the same manner as if no such reversal had occurred.

There were no parties before the Supreme Court of the United States except the parties to the writ of error, and these parties, under the motion for an order of severance, were limited to C. G. Blake, and Rogers, Brown & Company and the Hull Coal and Coke Company.

The refusal on the part of the Supreme Court of the United States to adjudge the supposed rights of the alien creditors was necessarily attributable to the fact that they were not before the court (*i. e.*, they had not taken writs of error), and the briefs then filed by their counsel did not change the status they have at all times occupied as parties acquiescent in the decree of the Supreme Court of Tennessee.

The decree of the Supreme Court of Tennessee, giving precedence to the creditors residing within Tennessee, is necessarily conclusive, except in respect to the parties to the proceeding who prosecuted successfully a writ of error and reversed the judgment of that court.

The effect of this reversal is to draw the parties in whose favor the judgment of reversal is pronounced to the class preferred under the decree of the Supreme Court of Tennessee, namely, the Tennessee creditors; and to authorize a distribution of assets, first in favor of such Tennessee creditors and Blake, and Rogers, Brown & Company as a class, and second to the foreign creditors, according to the terms of the original decree, which is unreversed as to them, as another class.

Mr. Justice Beard has stated our position in his dissent

to the majority opinion of the Supreme Court below. It is as follows (Record, 6, 7):

"While it is possible the Supreme Court of the United States did not have in mind this phase of the question, yet I think in its opinion there is laid down in general, but clear and unmistakable, terms a rule under which the Ohio creditors are entitled to what they now claim. That Court has said that, so far as they were concerned, the fifth section of the act was void, because violative of that clause of the Federal Constitution which provides that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' and the case has been remanded to this Court with direction that we see no advantage accrues to home creditors over the Ohio creditors. It is evident that, administering the assets as it is now adjudged shall be done, a valuable 'privilege' is secured to the Tennessee creditors of which the Ohio creditors are deprived. I think this is in the face of the opinion and mandate."

The fourth paragraph of the original decree (Original Record, 69), which was reversed by this Court (*Blake* v. *McClung*, 172 U. S., 239), reads as follows:

"4th. That all of the creditors of the Embreeville Freehold, Land, Iron, and Railway Company (Limited), who resided in the State of Tennessee, are entitled to priority of payment out of all of the assets of said company, both real and personal, over all of the other creditors of said company, who do not reside in the State of Tennessee, whether they be residents of other States of the United States, or of the Kingdom of Great Britain; and all of the creditors of the Embreeville Freehold, Land, Iron and Railway Company, who reside out of the State of Tennessee, whether they reside in the other States of the United States or in the Kingdom of Great Britain, have the right and must share equally and ratably in the distribution of said funds of the said company, after the residents of the State of Tennessee shall have been first paid in full."

The paragraphs of the decree entered upon the mandate of this Court (Record, 7, 8), and which purport to give effect to the opinion and mandate in *Blake* v. *McClung*, *supra*, read as follows:

"1. That the effect and purpose of the opinion and mandate of the Supreme Court of the United States in respect to the rights of C. G. Blake and Rogers, Brown & Company, is to adjudge and decree that the said C. G. Blake and Rogers, Brown & Company are entitled to participate in the assets of the said Embreeville Freehold, Land, Iron & Railway Company, Limited, upon the basis of a broad distribution of the assets of said corporation among all of its creditors, without preference or priority, as though the act of 1877, Chap. 31, had not been passed; and it is ordered that there be made a computation of the aggregate indebtedness due from the said insolvent corporation to its creditors of every class wherever residing, and that there shall be paid to the said C. G. Blake, and the said Rogers, Brown & Company, the percentage and proportion which is found to be due to them as creditors of said corporation in the aggregate of assets thus ascertained.

"2. It is further adjudged and decreed that after thus setting apart to the said C. G. Blake and Rogers, Brown & Company the proportion and percentage thus found to be due to them, that all the rest and residue of the estate of the said Embreeville Freehold, Land, Iron & Railway Company, Limited, is applicable first to the payment of the indebtedness due to the creditors of said corporation residing within the State of Tennessee, as provided in section '5' of Chapter 31 of the Acts of Tennessee, 1877, and that the residue of said estate, if any, shall then be applied pro rata to the payment of the debts of the alien and non-resident creditors of said corporation, other than the said C. G. Blake and Rogers, Brown & Company."

By a comparison of these decrees it will be seen that the Supreme Court of Tennessee has, by another but some-

what similar method, practically re-enacted its former decree, and continued, in effect, the same discrimination against Blake and Rogers, Brown & Company, in the distribution of the assets of the Embreeville Company, that had been decreed in the original suit. And this discriminating distribution is made upon the remarkable ground of what is called by the court below a "broad" distribution of assets.

How the word "broad" comes into the case can hardly be apprehended, inasmuch as the word, or the theory upon which it is used, most assuredly finds no place or sanction in the opinion and mandate of this Court in *Blake* v. *McClung*, 172 U. S., 239. The word "broad," as used, is equivalent to the word "discriminate," and constitutes the basis of the discrimination in the distribution of the assets of the Embreville Company in favor of the Tennessee creditors, whereby Blake and Rogers, Brown & Company are given a small percentage of the assets toward their claims, while the Tennessee creditors are then paid their claims in full, principal and interest, and the residue of the estate is applied to the payment of the alien creditors. The object of this scheme of distribution is apparent. If the claims of Blake and Rogers, Brown & Company, which amount to nearly $35,000, with interest, are assimilated to those of the Tennessee creditors, as we claim they should be under the mandate and opinion of this Court, the Tennessee creditors will not be paid in full; if, on the contrary, the present scheme of distribution is allowed to stand, Blake and Rogers, Brown & Company will receive less than $3,000 in all upon their

claims of nearly $35,000, while the Tennessee creditors will be paid in full, principal and interest, and there will be a residue of the assets for the foreign creditors. It seems to us that it is only necessary to call the attention of this Court to this unjust, discriminating, and unwarranted distribution of the assets of the corporation, in order to sustain our contention that the decree of the Tennessee court last entered is *inconsistent* with the mandate and opinion of this Court.

It has been said by this Court that it will consult its own opinion to ascertain what was intended by its mandate, and construe its mandate accordingly. (*In re* Sanford Fork and Tool Co., 106 U. S., 247, and cases cited.) We shall not presume, therefore, to discuss the opinion otherwise than in a general way in the presentation of the claims of the plaintiffs in error.

The two propositions announced at the outset contain the keynote of the opinion; they are both answered in the negative, and the original decree of the court below (Original Record, 69) is found to be repugnant to both propositions, and was reversed for that reason as to Blake and Rogers, Brown & Company.

The second decree, which has been entered for the purpose of giving effect to the opinion and mandate of this Court, if not repugnant to the first of the propositions, is clearly repugnant to the second proposition, inasmuch as it provides for a method of distribution of the assets of the corporation which discriminates against the rights of the plaintiffs in error and in favor of the Tennessee creditors, notwithstanding the status of the

plaintiffs in error has become exactly the same as that of the Tennessee creditors by reason of the reversal of the original decree by this Court as to them.

We submit this case with confidence that when the Constitution of the United States is applied to the questions involved, and the mandate of this Court is construed in the light of its own opinion, full justice will be measured out to the plaintiffs in error.

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